

STEPHEN H. SILVER, SBN 038241  
RICHARD A. LEVINE, SBN 091671  
JACOB A. KALINSKI, SBN 233709  
SILVER, HADDEN, SILVER, WEXLER & LEVINE  
1428 Second Street, Suite 200  
P.O. Box 2161  
Santa Monica, CA 90407-2161  
Telephone: (310) 393-1486  
Facsimile: (310) 395-5801

Attorneys for Plaintiff/Petitioner San Jose Retired  
Employees Association

**SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF SANTA CLARA**

SAN JOSE POLICE OFFICERS'  
ASSOCIATION,

Plaintiff,

v.

CITY OF SAN JOSE, BOARD OF  
ADMINISTRATION FOR POLICE  
AND FIRE DEPARTMENT  
RETIREMENT PLAN OF CITY OF  
SAN JOSE, and DOES 1-10, inclusive,

Defendants.

AND RELATED CROSS-COMPLAINT  
AND CONSOLIDATED ACTIONS.

) Lead Consolidated Case No. 1-12-CV-225926  
) (Consolidated Actions 1-12-CV-225928,  
) 1-12-CV-226570, 1-12-CV-226574,  
) 1-12-CV-227864 and 1-12-CV-233660)

) (Hon. Patricia M. Lucas, Dept. 2)

) **[PROPOSED] STATEMENT OF DECISION**

) Due Date: September 10, 2013

) Dept.: 2

) Complaint Filed: June 6, 2012

1     **I.     INTRODUCTION**

2             This lawsuit, which was consolidated with five other lawsuits, came on for trial before  
3 this Court, sitting without a jury, on July 23, 2013. The trial lasted five court days including  
4 July 26, 2013. At that time, the matter was taken under submission by the Court pending  
5 receipt of briefs and, oral argument, if desired by the Court. The Court, having reviewed all of  
6 the evidence, and all of the legal arguments presented by the parties, hereby renders its  
7 Statement of Decision.

8             In this consolidated lawsuit, Plaintiff/Petitioner San Jose Retired Employees'  
9 Association (SJREA), seeks injunctive, declaratory and writ relief on behalf of affected retirees  
10 ("Affected Retirees") of the Federated Employees Retirement Plan (the "Federated Plan";  
11 Exhibit 602, REA000170-000442), as well as qualifying spouses, domestic partners and other  
12 eligible beneficiaries of Affected Retirees and eligible beneficiaries of deceased employees  
13 ("Affected Beneficiaries"). SJREA contends that certain provisions of "The Sustainable  
14 Retirement Benefits and Compensation Act" ("Measure B", Exhibit 700, POA007036-007052)  
15 enacted by the voters of the City of San Jose (the "City") on June 5, 2012 impair vested  
16 contractual rights of Affected Retirees and Affected Beneficiaries, in violation of the "Contract  
17 Clause" of the California Constitution (Article I, Section 9). SJREA also asserts that Measure  
18 B violates (a) the Separation of Powers provision contained in Article III, Section 3 of the  
19 California Constitution and (b) the California Pension Protection Act, which appears in Article  
20 XVI, Section 17 of the California Constitution.

21             In particular, SJREA claims that Section 1510-A of Measure B (Exhibit 700,  
22 POA007048) impaired vested rights of Affected Retirees and Affected Beneficiaries to a  
23 specified annual Cost Of Living Adjustment ("COLA") as set forth in the City's Municipal  
24 Code ("SJMC") by converting this unconditional entitlement into one that is subject to  
25 reduction by temporary elimination in the event the City Council simply declares a fiscal and  
26 service level emergency, irrespective of whether one actually exists.

27             SJREA also asserts that Section 1512-A of Measure B (Exhibit 700, POA007049)  
28 impaired vested rights of Affected Retirees and Affected Beneficiaries to participate in the

1 City's medical and dental insurance plans and to receive a specified payment that would cover  
2 all or a portion of the monthly premiums by promulgating that these entitlements are no longer  
3 vested rights but, instead, are subject to the City's "power to amend, change or terminate [those  
4 benefits]."

5 Further, the SJREA argues that Section 1511-A of Measure B (Exhibit 700,  
6 POA007048) impaired the vested entitlements of Affected Retirees and Affected Beneficiaries  
7 as follows. The SJMC (a) established a Supplemental Retiree Benefit Reserve ("SRBR") and  
8 (b) mandates that, under certain specified circumstances, excess earnings be allocated to the  
9 SRBR from which the City Council is to exercise its discretion to provide supplemental  
10 benefits to retirees. (Exhibit 602, REA000293-000295) Section 1511-A of Measure B (Exhibit  
11 700, POA007048) discontinued the SRBR, whereupon the City transferred all of the funds  
12 contained therein to the General Retirement Trust Fund (Reporter's Transcript ("RT") 603:5-  
13 28; 692:27-693:21; 935:22-27), thereby impairing vested entitlements to have those SRBR  
14 funds and future excess earnings separated from the general fund of the Retirement Association  
15 to be available for distribution in order to supplement retirement allowances in high  
16 inflationary times at the discretion of City Council.

17 In addition, SJREA contends that the evidence presented at the trial established that  
18 Section 1504-A of Measure B (Exhibit 700, POA007039) impaired the existing vested  
19 entitlement of Affected Retirees and Affected Beneficiaries to have the City Council exercise  
20 its discretion, without any requirement of voter approval, to provide additional benefits over  
21 and above those specifically granted under the Federated Plan (including the SRBR) by  
22 limiting the ability of the City Council to provide those enhancements only to situations where  
23 there has been voter approval.

24 Furthermore, SJREA contends that Section 1515-A of Measure B, entitled  
25 "Severability", violates the separation of powers among the legislative, executive and judicial  
26 branches under Article III, Section 3 of the California Constitution because it empowers the  
27 City Council, not the Court, to make a determination as to whether any parts of an Ordinance  
28 adopted pursuant to Measure B are severable in the event an ensuing Ordinance is held to be

1 invalid, unconstitutional or otherwise unenforceable by a final judgment.

2 Finally, SJREA argues that Section 1513-A contravenes the California Pension  
3 Protection Act as set forth in Article XVI, Section 17(b) of the California Constitution. The  
4 basis for this contention is that Section 1513-A mandates the City's retirement board to  
5 consider the interests of the City's residents and taxpayers on an equal basis with Plan members  
6 and beneficiaries, whereas Article XVI, Section 17(b) of the Constitution expressly states that a  
7 retirement board's duty to its participants and beneficiaries shall take precedence over any  
8 other duty.

## 9 **II. RELEVANT LEGAL AUTHORITIES**

10 Article I, Section 9 of the California Constitution states:

11 A bill of attainder, ex post facto law, **or law impairing the obligation of**  
12 **contracts may not be passed.** (Emphasis added.)

13 For many decades, reported decisions of the California Supreme Court and its Courts of  
14 Appeal from all appellate districts have repeatedly and consistently held that, as soon as an  
15 individual commences rendering services for a public agency, he/she has earned as a part of the  
16 consideration in return for performing those services deferred compensation in the form of a  
17 vested contractual right to the retirement benefits that then exist for similarly situated  
18 employees (*i.e.*, those which would be provided if he/she qualified for retirement at that time).  
19 See, *e.g.*, *Kern v. City of Long Beach* (1947) 29 Cal.2d 848. "... [W]here services are rendered  
20 under a pension statute, the pension provisions become a part of the contemplated  
21 compensation for those services and so in a sense a part of the contract of employment itself."  
22 (*Id.* at 851-852.) In other words, pension benefits are a form of deferred compensation.  
23 (*Wallace v. City of Fresno* (1953) 42 Cal.2d 180, 184-185.) That deferred compensation  
24 matures into an unconditional entitlement when the individual satisfies the conditions precedent  
25 to qualifying for retirement benefits.

26 Under California law, there is a strong preference for construing governmental pension  
27 laws as creating contractual rights for the payment of benefits. (See *Allen v. City of Long*  
28 *Beach* (1955) 45 Cal.2d 128; *Terry v. City of Berkeley* (1953) 41 Cal.2d 698.) Where it is

1 feasible to do so the enactment of a governmental pension plan should be construed as  
2 guaranteeing full payment to those entitled to its benefits with the provision of adequate funds  
3 for that purpose. (*Bellus v. City of Eureka* (1968) 69 Cal.2d 336, 351; see also *Carman v.*  
4 *Alvord* (1982) 31 Cal.3d 318, 332.)

5 The right to pension benefits vests upon acceptance of employment. (*Betts v. Board of*  
6 *Administration* (1978) 21 Cal.3d 859, 863; *Miller v. State of California* (1977) 18 Cal.3d 808,  
7 815-816; and *Kern v. City of Long Beach, supra*, 29 Cal.2d 848, 852.) As an integral part of  
8 the agreed-upon compensation, a pension right, once vested (even though not yet matured),  
9 may not be destroyed by a public employer without impairing a contractual obligation, in  
10 violation of Article I, Section 9 of the California Constitution. (*Carman v. Alvord* (1982) 31  
11 Cal.3d 318, 325; *Betts v. Board of Administration, supra*, 21 Cal.3d 859, 863; and *Frank v.*  
12 *Board of Administration* (1976) 56 Cal.App.3d 236, 242.)

13 Further, where additional or improved retirement benefits are provided during  
14 employment, the employee earns a vested right to those enhanced benefits. (*Betts v. Board of*  
15 *Administration, supra*, 21 Cal.3d 859, 867; *Abbott v. San Diego* (1958) 165 Cal.App.2d 51,  
16 518.) Additionally, benefits entitled a survivor of a public employee are an element of the  
17 compensation owed to the public employee and thus may not be impaired. (*Packer v. Bd. of*  
18 *Retirement of the Los Angeles County Peace Officers' Retirement System* (1950) 35 Cal.2d 212,  
19 215.)

20 While vested pension rights may be modified prior to retirement, those modifications  
21 must be reasonable and "changes in a pension plan which would result in disadvantage to  
22 employees should be accompanied by comparable new advantages." (Emphasis added; *Allen v.*  
23 *City of Long Beach, supra*, 45 Cal.2d at 131; see also *Abbott v. City of Los Angeles* (1958) 50  
24 Cal.2d 438, 488-89.) Thus, even permissible amendments which must be accompanied by  
25 comparable new advantages only can occur with respect to employees, not retirees.

26 This concept was clearly recognized in *Allen v. Board of Administration of the Public*  
27 *Employees Retirement System* (1983) 34 Cal.3d 114, 120, when, after quoting the above  
28 language from *Allen v. City of Long Beach* and *Abbott v. City of Los Angeles*, the Supreme

1 Court observed:

2 As to retired employees, the scope of continuing governmental power may be  
3 **more restricted, the retiree being entitled to the fulfillment of the contract**  
4 **which he already has performed without detrimental modification.**  
[Citation.] (Emphasis added.)

5 Therefore, once an individual has retired, the former employer cannot make any  
6 modifications to the pension plan that would result in a disadvantage to that individual. This  
7 proposition previously had been solidified by the California Supreme Court in *Terry v. City of*  
8 *Berkeley, supra*, 21 Cal.2d 698, 702-03. That opinion emphasized that any changes that are  
9 permissible before retirement cannot occur once an individual has actually retired, where the  
10 employee had “rendered the called-for performance; . . . had done everything possible to entitle  
11 him to the payment of the pension and all conditions precedent to the obligation of the city  
12 were fulfilled upon the determination that he be retired as a result of the service-connected  
13 disability.”

### 14 **III. RELEVANT PROVISIONS OF THE CITY’S ENACTMENTS**

15 Article XV, Section 1500 of the City Charter (Exhibit 701, POA007114) requires the  
16 City Council to establish and maintain a retirement plan for all officers and employees of the  
17 City. The City Council has complied with those mandates. Among the benefits to which  
18 SJREA asserts that Affected Retirees and Affected Beneficiaries earned vested rights during  
19 employment are: (1) unrestricted COLAs that are not subject to suspension or termination  
20 (SJMC Chapter 3.44, Exhibit 602, REA000429-000441); (2) entitlement to medical and dental  
21 insurance coverage and premium subsidies (SJMC Chapter 3.28, Parts 16 and 17; Exhibit 602,  
22 REA000396-000403); (3) the right to fund, and receive discretionary distributions from, the  
23 SRBR (SJMC Section 3.28.340; Exhibit 602, REA000293-000295); and (4) the right to have  
24 the City Council provide additional or improved benefits to retirees without voter approval (see  
25 e.g. RT 555:3-10).

#### 26 **A. COLAs**

27 On or about April 1, 1970, the City Council passed Ordinance No. 15118 (Exhibit 606,  
28 REA000445-000473) which enacted Chapter 9, Article II, Part 6 of the SJMC, providing

1 COLAs for retirement allowances and survivorship allowances based upon percentage changes  
2 in the applicable Consumer Price Index. (Exhibit 606, REA000448.) Prior to 2006, the SJMC  
3 provided for an annual COLA based upon the percentage increase in the applicable Consumer  
4 Price Index published by the United States Department of Labor with a "cap" of three percent.  
5 (Exhibit 606, REA000447.)

6 On or about February 7, 2006, the City Council passed Ordinance No. 27652, which  
7 added Section 3.44.160 to Chapter 3.44 of the SJMC and provided for fixed three percent  
8 annual COLAs. (Exhibit 630, REA000561.) Section 3.44.160 of the current SJMC states in  
9 pertinent part at paragraph (a)(1):

10 Each retirement allowance and each survivorship allowance which is payable  
11 under Chapter 3.24 or Chapter 3.28 in any subject year which begins on or after  
12 April 1, 2006, together with any increases or decreases in the amount of any  
13 such allowance which were previously made pursuant to this Chapter 3.44, shall  
14 be increased by three percent per annum in lieu of the increase otherwise  
provided in this chapter. The first such three percent increase shall be made on  
April 1, 2006. (Exhibit 602, REA000441)

15 Throughout this entire time, employees funded a portion of this COLA benefit by  
16 paying contributions that, in part, were designed to fund an annual three percent COLA. Even  
17 prior to the passage of Ordinance No. 27652, the employees' contribution rate attributable to  
18 the COLA was based on an actuarial assumption that the COLA would increase 3% annually.  
19 (RT 353:12-24; see also, Exhibit 651, REA000781, which shows that employees contributed  
20 1.61% of their income towards COLAs.)

21 **B. City's Medical and Dental Plans**

22 Pursuant to SJMC Chapter 3.28, Part 16 (Exhibit 602, REA000396-000400), which  
23 became effective on or about September 18, 1984 with the passage of Ordinance No. 21763  
24 (Exhibit 711, AFSCME003875-003884), Affected Retirees who were employed on or after that  
25 date, their Affected Beneficiaries, and those persons who became Affected Beneficiaries on or  
26 after such enactment, became eligible to participate in the City's medical plan with respect to  
27 which the Federated Plan pays all or a prescribed portion of the premium upon and following  
28 their retirement or, in the case of a survivor, following the death of the member.

1 As with the COLAs, during their employment with the City, employees contributed a  
2 percentage of their income to the funding of the medical and dental plan benefits. (See for  
3 example, Exhibit 651, REA000781, which shows that employees contributed 1.02% of their  
4 income towards the medical benefit and .23% of their income to the dental benefit.)

5 Section 3.28.1970 of the SJMC states in pertinent part:

6 A. A member, as specified in Section 3.28.1950, above, is eligible to  
7 participate in a medical insurance plan sponsored by the city provided that the  
8 member satisfies the following requirements:

9 1. The member retires for service or disability pursuant to the  
10 provisions of this chapter; and

11 2. The member applies for medical insurance coverage at the time of  
12 his or her retirement in accordance with the provisions of the medical insurance  
13 plan, and agrees to pay any applicable premiums. (Exhibit 602, REA000398.)

14 Pursuant to SJMC Chapter 3.28, Part 17 (Exhibit 602, REA000400-000403) which  
15 became effective on or about June 3, 1986 with the passage of Ordinance No. 22261 (Exhibit  
16 610, REA000474-000481), Affected Retirees who were employed on or after that date, their  
17 Affected Beneficiaries, and those persons who became Affected Beneficiaries on or after that  
18 date who met the requirements set forth therein, became eligible to participate in the City's  
19 dental plan with respect to which the Federated Plan pays all of the premium upon and  
20 following their retirement or, in the case of a survivor, following the death of the member.

21 Section 3.28.2020 states in pertinent part:

22 A. A **member**, as specified in Section 3.28.2000 above, is eligible to  
23 participate in a dental insurance plan sponsored by the city provided that the  
24 member satisfies the following requirements:

25 1. The **member** terminates city employment pursuant to the retirement  
26 provisions of this chapter; and

27 2. At the time of his or her retirement, **the member** is enrolled in one of  
28 the dental insurance plans sponsored by the city. (Emphasis added;  
Exhibit 602, REA000401-000402.)

29 **C. The SRBR**

30 On or about June 3, 1986, the City Council enacted SJMC Section 3.28.340 (Exhibit  
31 602, REA000293-000295) with the passage of Ordinance No. 22263 (Exhibit 614,



1 REA000482-000486) which established the SRBR within the San Jose Federated Employees  
2 City Retirement Fund (the "Fund"). In a May 6, 1986 Memorandum from Fran Galloni, then  
3 Director of Personnel of the City, to the Honorable Mayor and City Council, Galloni wrote:

4 I am recommending two benefits – Dental and SRBR – increases for Federated  
5 retirees. These two are very similar to the ones already approved by Council for  
6 Police and Fire retirees. The SRBR is comparable to the one percent per year  
7 that was granted to the Police and Fire. The benefit level is much lower, but it is  
8 what the Federated Board requested. Even though the benefit level is lower, **it is**  
9 **a program which will be a permanent part of the Federated Retirement**  
10 **System.** (Emphasis added; Exhibit 638, REA000683.)

11 The purpose of the SRBR was to provide additional payments or other benefits to  
12 retired members, survivors of members, and survivors of retired members. (SJMC Section  
13 3.28.340(E)(1); Exhibit 602, REA000294.) As evidenced by the frequent occurrence of the  
14 word "shall" throughout SJMC Section 3.28.340, that section contains mandatory language  
15 requiring the funding of the SRBR. Further, it contains mandatory language for the exercise of  
16 discretion by the City Council as to whether to make a distribution from the SRBR upon a  
17 recommendation from the Board of Administration for the Federated Plan ("Board"). In that  
18 regard, SJMC Section 3.28.340(B)(2) states:

- 19 a. The board **shall** credit to the supplemental retire (sic) benefit reserve all  
20 interest payable pursuant to subsection C. below and that portion of the excess  
21 earnings determined pursuant to subsection D. below.
- 22 b. Distributions from the supplemental retiree benefit reserve **shall** be made in  
23 accordance with subsection E. below. (Emphasis added; Exhibit 602,  
24 REA000293.)

25 SJMC Section 3.28.340(C)(2) reads in pertinent part:

26 Interest **shall** be credited to the supplemental retiree benefit reserve at the  
27 actuarially assumed annual rate adopted by the board pursuant to Section  
28 3.28.200 or at the actual rate of return earned by the retirement fund during the  
applicable fiscal year, whichever is lower. Interest credited to the supplemental  
retiree benefit reserve **shall** be calculated as though the transfer of excess  
earnings required by subsection D. had been made on July 1 of the calendar  
year, regardless of the actual date such transfer is made. (Emphasis added;  
Exhibit 602, REA000294.)

SJMC Section 3.28.340(D)(2) provides in pertinent part:

1 If the balance remaining in the income account is greater than zero, the board  
2 **shall** by written resolution declare that balance to be the excess earnings for the  
3 applicable fiscal year, **shall** transfer ten percent of the excess earnings to the  
4 supplemental retiree benefit reserve, and shall transfer the remaining ninety  
5 percent of the excess earnings to the general reserve. (Emphasis added; Exhibit  
6 602, REA000294.)

7 SJMC Section 3.28.340(E)(2) provides in pertinent part:

8 Upon request of the city council or on its own motion, the board **may** make  
9 recommendations to the city council regarding the distribution, **if any**, of the  
10 supplemental retiree benefit reserve to retired members, survivors of members,  
11 and survivors or retired members. The city council, after consideration of the  
12 recommendation of the board, **shall determine** the distribution, **if any**, of the  
13 supplemental retiree benefit reserve to said persons. (Emphasis added; Exhibit  
14 602, REA000294-295.)

15 **D. The Right To Have The City Council Provide Increased Benefits To**  
16 **Retirees And Beneficiaries Without The Approval Of The Voters.**

17 The City's own enactments establish that the City Council has historically elected to  
18 provide retirees and beneficiaries of deceased retirees with additional or improved benefits at  
19 times it has done so for active employees. This was confirmed at trial by the testimony of City  
20 Auditor Sharon Erickson who related that at least some of the new benefits the City provided  
21 were retroactively applied to people who had already retired.<sup>1</sup> (RT 555:3-10.)

22 For example, in 1970, when the COLA began, the implementing Ordinance (15118)  
23 specifically called for percentage increases in monthly allowances for individuals who had  
24 retired as far back as 1939. (Ordinance 15118, Section 2904.400, Exhibit 606, REA000461-  
25 000462.)

26 With regard to medical insurance, Section 3.28.1950 describes the universe of persons  
27 eligible to receive medical insurance coverage and subsidies under the City's plan. It states in  
28 pertinent part:

Subject to the provisions of this chapter, a **member** may be entitled to medical  
insurance coverage in an eligible medical plan as specified in Section 3.28.1970

<sup>1</sup> Further, she testified that only in a small number of instances, if ever, were these new benefits granted by the voters, as opposed to the City Council. (RT 555:11-556:3.)

1 if the member satisfies the requirements of Subsection A., Subsection B., or  
2 Subsection C.

3 A. The **member** is retired for service or disability under the provisions  
4 of this chapter and at the time of such retirement meets any of the following  
5 requirements:

- 6 1. Is entitled to credit for fifteen or more years of service.

(Emphasis added; REA000397.)

7 The term "member" is defined in SJMC Section 3.28.030.15., which states:

8 "Member" means a person who becomes a member of this system pursuant to  
9 the provisions of Part 4 of this chapter whose membership shall not have been  
10 terminated pursuant to the provisions of this chapter. No other persons are  
11 members.

12 The term "member" includes persons who retired prior to September 18, 1984, when  
13 the medical insurance benefits were first adopted. (Exhibit 711, AFSCME003875-003884.)  
14 SJMC Section 3.28.400, included in Part 4 of Chapter 3.28, states:

15 Each person who on June 30, 1975, was an officer or employee of the city  
16 holding an office or position entitling him or her to membership in this  
17 retirement plan pursuant to the provisions of Chapter 3.24 and who, in addition,  
18 was a member of the retirement plan that date, shall become and be subject to  
19 the provisions of this Chapter 3.28 upon its becoming effective if he or she  
20 continues to hold that office or position to and through July 1, 1975, and, in  
21 addition, continues to be a member of the Chapter 3.24 retirement system until  
22 the effective date of this chapter. Upon becoming subject to the provisions of  
23 this chapter, each such person ceases to be a subject to the provisions of Chapter  
24 3.24 and he or she, and all other persons or estates that might have any rights  
25 under Chapter 3.24 because of the person's coverage under Chapter 3.24, cease  
26 to have any rights under Chapter 3.24 but shall thereafter be governed by and  
27 have only such rights as are provided by this Chapter 3.28 system.

28 Therefore, all individuals who retired after July 1, 1975 are considered members of the  
Chapter 3.28 retirement system and would also be eligible for the medical insurance benefit  
described in SJMC 3.28.1950.

Furthermore, with respect to participation in the City's medical plan, Ordinance No.  
21763 (Exhibit 711, AFSCME003875-003879), adopted in 1984 granted retired members of

1 the 1951-1975 version of the Federated Plan (SJMC Chapter 3.24, specifically Part 23; Exhibit  
2 602, REA000269-000271) entitlement to medical coverage after retirement. As a result, retired  
3 members who had retired well before the enactment of Ordinance No. 21763 received retiree  
4 medical coverage through the City's medical plan.

5 Similarly, Ordinance No. 22261(Exhibit 610, REA000475-000478), adopted in 1986,  
6 references the broad term "member," which includes all individuals retiring after July 1, 1975.  
7 Additionally, it granted retired members of the 1951-1975 version of the Federated Plan (SJMC  
8 Chapter 3.24 specifically Part 24; Exhibit 602, REA000271-273) entitlement to post-retirement  
9 dental coverage. As a result, members who had retired well before the enactment of Ordinance  
10 No. 22261 received dental coverage through the City's dental plan.

11 There is no limitation anywhere in the SJMC that those retired members must have  
12 retired after 1986, when the SRBR was implemented, in order to qualify for distributions from  
13 the SRBR. Furthermore, the City Council's Resolution No. 71780 (Exhibit 649, REA000684-  
14 000691, which set forth the methodology for distributions from the SRBR in 2003, defined  
15 "retiree" as "a person who has retired from the Federated City Employees Retirement System  
16 under the provisions of the System. 'Retiree' does not include any person who has separated  
17 from City service but is not receiving a benefit from the Federated Plan." (Exhibit 649,  
18 REA000689.) Again, there is no limitation that a retiree must have retired after a certain date,  
19 despite the existence of a different limitation.

20  
21 **IV. MEMBERS OF THE FEDERATED PLAN WHO WERE RETIRED AT THE**  
22 **TIME MEASURE B WAS ENACTED ACQUIRED VESTED RIGHTS THAT WERE**  
23 **IMPAIRED BY MEASURE B.**

24 As previously discussed, Article I, Section 9 of the California Constitution forbids the  
25 passage of laws impairing the obligation of contracts. Therefore, an analysis as to whether an  
26 impairment has occurred must begin with the definition of the word "impair." "In construing  
27 [an enactment], we begin by examining ... language, giving the words their usual and ordinary  
28 meaning, because words of [an enactment] ordinarily provide the most reliable indication of

1 ...intent.” (*Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152.)

2 Black’s Law Dictionary, Abridged 8th Edition, defines impair as: “To diminish the  
3 value of property or a property right. This term is commonly used in reference to diminishing  
4 the value of a contractual obligation to the point that the contract becomes invalid or a party  
5 loses the benefit of the contract.” In contrast, it defines abrogate, which term does **not** appear  
6 in Article I, Section 9, as “To abolish (a law or custom) by formal or authoritative action; to  
7 annul or repeal.” The two words are related, but are differentiated by degree. To impair is to  
8 lessen, while to abrogate is to destroy.

9 In order to find that vested rights have been impaired, no showing is required that the  
10 Affected Retirees and Affected Beneficiaries have presently suffered monetary loss.  
11 Subjecting vested rights to an increased risk of detriment is sufficient to impair the vested  
12 contractual rights of the Affected Retirees and Affected Beneficiaries.

13 In *Teachers’ Retirement Bd. v. Genest* (2007) 155 Cal.App.4th 1012 (“*TRB*”), the  
14 Teachers’ Retirement Board challenged legislation that sought to reduce the State’s obligation  
15 to fund the Supplemental Benefit Maintenance Account of the Teachers’ Retirement Fund  
16 (“SBMA”) by \$500 million. By an earlier statute, the Legislature had granted retirement  
17 association members a vested right to have the State make an appropriation equal to 2.5 percent  
18 of the total of the creditable compensation of the immediately preceding calendar year upon  
19 which members’ contributions are based for purposes of funding the SBMA. (*Id.* at 1022.)  
20 The challenged bill provided for an actuarial valuation to be made every four years of the  
21 anticipated liability of the SBMA. If the valuation disclosed that the funds in the SBMA would  
22 be insufficient, then money would be appropriated from the General Fund to cover the shortfall.  
23 (*Id.* at 1023.)

24 The Court summarized that what the Legislature had done was to replace a \$500 million  
25 obligation with a contingent obligation to transfer the sum to the SBMA over a 33 year period,  
26 conditioned upon a determination by an actuary establishing that this sum or any portion  
27 thereof is needed to meet the purchasing power protection benefit obligations in any year  
28 between 2006 and 2036. If any actuary were to determine that the SBMA was able to provide

1 80 percent purchasing power protection until July 2036, (and the operative period was not  
2 extended) then the \$500 million the Legislature deducted from its obligation to fund the SBMA  
3 would never be reimbursed. (*Id.* at 1024.)

4 The Court determined that reducing the income stream available to pay the  
5 supplemental benefits by \$500 million increased the risk to members that SBMA funds would  
6 be insufficient to make the supplemental benefit payments in the future. Consequently, it held  
7 that, because the challenged bill did not provide some comparable new advantage, it  
8 substantially impaired contractual rights in violation of the State and Federal Constitutions.  
9 (*Id.* at 1039.)

10 Likewise, the conduct of an employer in delaying the payment of its required retirement  
11 contributions or refraining from making them altogether impairs the vested rights of affected  
12 individuals to a fiscally sound retirement system. (See *Board of Administration v. Wilson*  
13 (1997) 52 Cal.App.4th 1109 and *Valdes v. Cory* (1983) 139 Cal.App.3d 773.)

14 In *Valdes*, the Court invalidated as unconstitutional certain 1982 legislative  
15 amendments affecting the method of funding by the Public Employees' Retirement System  
16 ("PERS") under the Public Employees' Retirement Law ("PERL"). One provision prohibited  
17 payment of previously appropriated state-employer contributions from the state General Fund  
18 to the PERS fund for three months and reverted those monies to the unappropriated surplus of  
19 the General Fund. (*Id.* at 778.) Another provision ceased school-employer contributions for  
20 the same three months and provided a mechanism for their reversion to the unappropriated  
21 surplus of the General Fund. (*Ibid.*) The legislation also required the PERS Board to transfer  
22 an amount equal to that which would otherwise be paid by state and school employers as their  
23 three-month contributions to PERS from the "reserve against deficiencies" portion of the PERS  
24 fund to its unallocated portion. (*Ibid.*) The legislation further mandated a retroactive reduction  
25 of previously appropriated employer contributions by some school employers for the previous  
26 fiscal year and directed the PERS Board to make commensurate adjustments or refunds from its  
27 reserve against deficiencies. (*Id.* at 778-79.)  
28

1 The Opinion noted that the employees suffered no out-of-pocket losses from the  
2 suspension of employer contributions because PERS benefits are defined by statutory formula  
3 at the time of employment. (*Id.* at 785.) Nevertheless, the Court emphasized (*ibid.*) that  
4 “Authority is not lacking, however, for the proposition that employee pension beneficiaries  
5 have a vested interest in the integrity and security of the source of funding for the payment of  
6 benefits. (Citations.)”

7 Accordingly, the Court decided that the state employers were contractually bound in a  
8 constitutional sense to pay the withheld appropriations to the PERS fund, since explicit  
9 language in the retirement law constituted a contractual obligation on the part of the state as  
10 employer to abide by its continuing obligation to make the statutorily set payment of monthly  
11 contributions. (*Id.* at 787, 783-789.) The Opinion further stated (at 786):

12 When instead the Legislature directs that funds held in trust for the exclusive  
13 benefit of the members and beneficiaries of PERS be used to satisfy the state’s  
14 contractual obligations to make monthly contributions to the retirement fund so  
15 that monies regularly appropriated for that purpose can irretrievably be  
16 redirected to balance the state budget, the effect is that...vested rights of PERS  
members are impaired.

16 The Court (at pp. 789-90) concluded “... that the Legislature’s rescission of existing  
17 appropriations for employer contributions, theoretically representing the ‘employer’s ongoing  
18 share of the actuarial equivalent of amounts necessary to fund current and future benefits due  
19 covered employees’ (citation omitted), substantially impairs public employees’ assurance that  
20 they will ultimately receive the retirement benefits to which they become entitled (citation  
21 omitted).” (Emphasis added.)

22 Likewise, in *Wilson v. Board of Administration*, *supra*, 52 Cal.App.4<sup>th</sup> 1109, 1118, the  
23 Court struck down as an impairment of employees’ vested rights an enactment which  
24 threatened employees’ assurance of receiving earned benefits after retirement. *Wilson* involved  
25 an enactment calling for “in arrears” pension financing, as distinguished from a “level  
26 contribution” system. Under the “level contribution” system, payments flowed to the  
27 retirement fund as liability was incurred for future pension obligations. Under the “in arrears”  
28

1 system, contributions would not be paid during the same fiscal year that employee services  
2 were rendered. (*Id.* at 1121-1122.)

3       **A.     COLAs**

4       The Affected Retirees who were employed on or after April 1, 1970, their Affected  
5 Beneficiaries, and those persons who became Affected Beneficiaries on or after such enactment  
6 who met the eligibility requirements set forth in Chapter 9, Article II, Part 6 of the SJMC  
7 earned a vested contractual right to the COLAs described therein. Section 1510-A of Measure  
8 B impairs the vested rights of Affected Retirees and Affected Beneficiaries to receive COLAs  
9 because it adds a contingency whereby the City can suspend COLAs upon its mere declaration  
10 of a fiscal and service level emergency, where no such contingency previously existed, and  
11 thereafter restore the COLA only on a prospective basis. Section 1510-A states:

12           If the City Council adopts a resolution declaring a fiscal and service level  
13 emergency, with a finding that it is necessary to suspend increases in cost of  
14 living payments to retirees the City may adopt the following emergency  
15 measures, applicable to retirees (current and future retirees employed as of the  
effective date of this Act):

16       (a)     Cost of living adjustments (“COLAs”) shall be temporarily suspended  
17 for all retirees in whole or in part for up to five years. The City Council shall  
18 restore COLAs prospectively (in whole or in part), if it determines that the fiscal  
19 emergency has eased sufficiently to permit the City to provide essential services  
protecting the health and well-being of City residents while paying the cost of  
such COLAs. (Exhibit 700, POA007048.)

20       By adding a contingency whereby the City Council can now suspend the three percent  
21 COLA for up to five years and then restore it only on a prospective basis simply by declaring a  
22 fiscal emergency, Section 1510-A has weakened and diminished the value of the vested rights  
23 of Affected Retirees and Affected Beneficiaries. Just as in *TRB*, *Valdes* and *Wilson*, the  
24 Affected Retirees and Affected Beneficiaries need not wait to see whether the City ever  
25 declares a fiscal emergency before an impairment takes place, any more than the plaintiffs in  
26 those cases needed to wait for a reduction of benefits before a substantial impairment could be  
27 asserted.

28       In its Opening Brief, the City argues (at pp. 24-25) that “[t]he law of vested rights



1 acknowledges that even vested rights may be suspended in the event of an emergency”, citing  
2 to *Valdes* (at 790-791.) The City’s argument is problematic for several reasons. First, the City  
3 would not have needed to place Section 1510-A on the ballot if it was only intended to permit  
4 the City to do that which is already allowed. By taking that action, the City must be regarded  
5 as having intended to expand its power to impair vested rights in situations where an actual  
6 fiscal emergency did not exist.

7 Most importantly, “the law of vested rights” requires much more than the mere  
8 declaration of fiscal emergency, which is all that is needed under Section 1510-A, before the  
9 City can suspend COLAs to which the Affected Retirees have earned a vested right. For  
10 example, in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23  
11 Cal.3d 296, the California Supreme Court issued a peremptory writ of mandate directing  
12 several municipal entities to pay their officers and employees the salary increases provided in  
13 various collective bargaining contracts despite a contention by the municipal entities that the  
14 existence of a fiscal emergency allowed them to impair the agreements without running afoul  
15 of the Contracts Clauses of the United States and California Constitutions.

16 The California Supreme Court relied on the United States Supreme Court case of  
17 *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, stating (at 308):

18 The court recognized that the contract clause was not an absolute bar to  
19 subsequent modification of a state’s own financial obligations, but held that in  
20 determining whether such a modification is justified, complete deference to a  
21 legislative assessment of reasonableness and necessity **is not required because**  
22 **the government’s self-interest is at stake.** It stated, “[A] governmental entity  
23 can always find a use for extra money, especially when taxes do not have to be  
24 raised. **If a State could reduce its financial obligations whenever it wanted**  
25 **to spend the money for what it regarded as an important public purpose, the**  
26 **Contract Clause would provide no protection at all.... [A] State cannot refuse to**  
27 **meet its legitimate financial obligations simply because it would prefer to spend**  
28 **the money to promote the public good rather than the private welfare of its**  
**creditors .... [A] State is not completely free to consider impairing the**  
**obligations of its own contracts on a par with other policy alternatives.**  
Similarly, a State is not free to impose a drastic impairment when an evident and  
more moderate course would serve its purposes equally well. (Emphasis  
added.)

1 The *Sonoma* Opinion relied on another United States Supreme Court decision, *Home*  
2 *Building & Loan Association v. Blaisdell* (1934) 290 U.S. 398, 434, which articulated the  
3 following five factors to be considered when balancing the language of the Contracts Clause  
4 against the State's interest in exercising its police power: Whether the Act (1) was an  
5 emergency measure; (2) was one to protect a basic societal interest, rather than particular  
6 individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions;  
7 and (5) was limited to the duration the emergency. (See also *Energy Reserves Group v. Kansas*  
8 *Power & Light* (1983) 459 U.S. 400, 412; *United Firefighters of Los Angeles City v. City of Los*  
9 *Angeles* (1989) 210 Cal.App.3d 1095, 1109.)

10 The *United Firefighters* Opinion stressed (at 1112-13), that any asserted emergency  
11 impairments of a pension benefit cannot be implemented to repair errors and omissions where  
12 the governmental entity failed to conform to sound actuarial practices, referencing the *Sonoma*  
13 Court's appreciation of that concept (at 23 Cal.3d 313.) Finally, the Court of Appeal also noted  
14 (at 1113) that any emergency impairment in the pension benefit context had to bear a material  
15 relation to the theory of a pension system and its successful operation.

16 Therefore, both California and Federal authorities require a far more significant  
17 showing by a municipality trying to justify the impairment of a vested contractual right than a  
18 mere "declaration" of fiscal emergency. By reducing the City's legal burden to a "declaration,"  
19 Section 1510-A has substantially impaired the vested contractual rights of the Affected  
20 Retirees.

#### 21 **B. Retiree Medical and Dental Benefits**

22 Those Affected Retirees who were employed on or after the enactment of the City's  
23 medical plan, their Affected Beneficiaries and those persons who became Affected  
24 Beneficiaries on or after such enactment who met the minimum requirements set forth in the  
25 Federated Plan earned a vested contractual right to participate in the City's medical plan  
26 following the Affected Retirees' retirement or, in the case of a survivor, following the death of  
27 the member.

28 Likewise, those Affected Retirees who were employed on or after the enactment of the

1 City's dental plan, their Affected Beneficiaries, and those persons who became Affected  
2 Beneficiaries on or after such enactment who met the minimum requirements set forth in the  
3 Federated Plan, earned a vested contractual right to participate in the City's dental plan  
4 following the Affected Retirees' retirement or, in the case of a survivor, following the death of  
5 the member.

6 Section 1512-A impairs the vested rights of Affected Retirees and Affected  
7 Beneficiaries to health and dental insurance coverage and premium subsidies by converting  
8 what were vested contractual rights into non-vested rights. In that regard, Section 1512-A of  
9 Measure B states in pertinent part:

10 (b) Reservation of Rights. No retiree healthcare plan or benefit shall grant  
11 any vested right, as the City retains its power to amend, change or terminate any  
12 plan provision." (Exhibit 700, POA007049.)

13 On its face, Section 1512-A, paragraph (b) of Measure B impairs the vested rights of  
14 Affected Retirees and Affected Beneficiaries by turning them into non-vested rights.<sup>2</sup> Just as  
15 with Section 1510-A, which impairs Affected Retirees' and Affected Beneficiaries' right to  
16 COLAs, the alteration of the right to health care and dental coverage and premium  
17 contributions from vested to non-vested rights increases the risk that such rights will be reduced  
18 or abrogated and, thus, is in itself an impairment.

### 19 C. The SRBR

20 As evidenced by the frequent occurrence of the word "shall" throughout SJMC Section  
21 3.28.340, that provision contains mandatory language requiring the funding of the SRBR.  
22 Further, it contains mandatory language for the exercise of discretion by the City Council as to  
23 whether to make a distribution from the SRBR upon a recommendation from the Board of  
24 Administration for the Federated Plan ("Board").

25 Therefore, those Affected Retirees who were employed on or after the establishment of  
26 the SRBR and those persons who became beneficiaries on or after its establishment who met

27  
28 <sup>2</sup> The fact that the City deemed it necessary to include this conversion in Measure B is perhaps the strongest  
evidence that these retiree medical and dental benefits already earned were regarded by the City as, and are, vested  
rights.

1 the eligibility requirements set forth in SJMC Section 3.28.200, et seq. earned vested rights to  
2 (a) the funding and maintenance of the SRBR pursuant to the terms set forth in SJMC Section  
3 3.28.340 as well as (b) the exercise of discretion by the City Council as to when to provide  
4 distributions from the SRBR.

5 The City argued at trial that, because the City Council retained discretion as to when to  
6 make distributions, Affected Retirees and Affected Beneficiaries could not have acquired a  
7 vested right to the funding and discretionary distributions from the SRBR. (RT 65:8-27.) The  
8 City's arguments were misplaced as they require the Court to overlook the mandatory language  
9 occurring throughout SJMC Section 3.28.340.<sup>3</sup>

10 Based upon the mandatory language appearing above, the City has absolutely no  
11 discretion with respect to the establishment and funding of the SRBR. Further, pursuant to  
12 SJMC Section 3.28.340(B)(2)(b), the City Council must exercise its discretion from time to  
13 time as to whether it would then be appropriate to distribute those earmarked funds.  
14 Consequently, the only discretion the City maintains is when to provide distributions from the  
15 SRBR.

16 The term "if any" in the SJMC Section 3.28.340(E)(2) shows that, following any given  
17 motion or recommendation made by the Board or the City Council, the City Council is not  
18 required to authorize a distribution. However, as evidenced by the presence of the word "shall"  
19 in SJMC Section 3.28.240(E)(2), upon any such motion or recommendation, retired members  
20 and their survivors are entitled to a determination by the City Council as to whether it will  
21 authorize the particular recommended distribution at that time. This conclusion is supported by  
22 the fact that, in contrast to SJMC Section 3.28.240(E)(2), the phrase "if any" does not appear in  
23 SJMC Section 3.28.340(A)(2)(b).

24 Just because the City Council has "discretion to 'determine the distribution,' it does not  
25 mean that a contractual obligation does not arise. Under California law, an obligation under a  
26

27  
28 <sup>3</sup> The City also pointed out that due to the discretion it retained to make distributions, no one could have relied  
on any distributions from the SRBR. (RT 66:3-10.) There is no authority for the proposition that a specific  
finding of reliance is required to establish a vested right.

1 contract is not illusory if the obligated party's discretion must be exercised with reasonableness  
2 or good faith. (*Storek and Storek, Inc. v. Citicorp Real Estate, Inc.* (2002) 100 Cal.App.4th 44,  
3 61; *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806, 'the implied covenant of  
4 good faith is also applied to contradict an express contractual grant of discretion when  
5 necessary to protect an agreement which otherwise would be rendered illusory and  
6 unenforceable'.)

7 California Constitution, Article 16 Section 17, provides in pertinent part:

8 (a) . . . **The assets of a public pension or retirement system are trust funds**  
9 and shall be held for the exclusive purposes of providing benefits to  
10 participants in the pension or retirement system and their beneficiaries and  
11 defraying reasonable expenses of administering the system. (Emphasis  
12 added.)

13 Thus, the SRBR is a separate trust whose beneficiaries are retired members and their  
14 survivors. Under the terms of the Federated Plan, the governing body of the City, its City  
15 Council, is the trustee, charged with making distributions from the trust to the retired members  
16 and their survivors at times within their discretion. Therefore, it is instructive to analyze  
17 Measure B's impact on the SRBR using the law of trusts.

18 California Probate Code Section 16080 provides: "Except as provided in Section  
19 16081, a discretionary power conferred upon a trustee is not left to the trustee's arbitrary  
20 discretion, but shall be exercised reasonably." California Probate Code Section 16081 states:

21 (a) Subject to the additional requirements of subdivisions (b), (c), and (d), if a  
22 trust instrument confers "absolute," "sole," or "uncontrolled" discretion on a  
23 trustee, the trustee shall act in accordance with fiduciary principles and shall not  
24 act in bad faith or in disregard of the purposes of the trust.

25 (b) Notwithstanding the use of terms like "absolute," "sole," or "uncontrolled"  
26 by a settlor or a testator, a person who is a beneficiary of a trust that permits the  
27 person, either individually or as trustee or cotrustee, to make discretionary  
28 distributions of income or principal to or for the benefit of himself or herself  
pursuant to a standard, shall exercise that power reasonably and in accordance  
with the standard.

Most importantly, California Probate Code Section 16082 states: "Except as otherwise  
specifically provided in the trust instrument, a person who holds a power to appoint or  
distribute income or principal to or for the benefit of others, either as an individual or as a

1 trustee, may not use the power to discharge the legal obligations of the person holding the  
2 power.”

3 Section 1511-A of Measure B states:

4 The Supplemental Retiree Benefit Reserve (“SRBR”) **shall be discontinued,**  
5 **and the assets returned to the appropriate retirement trust fund.** Any  
6 supplemental payments to retirees in addition to the benefits authorized herein  
7 shall not be funded from plan assets. (Emphasis added; Exhibit 700,  
8 POA007048-007049.)

9 The passage of Section 1511-A of Measure B, which abolishes the SRBR, impairs the  
10 vested rights of the Affected Retirees and Affected Beneficiaries to the funding of, and  
11 discretionary distributions from, the SRBR. Measure B abolishes the trust and allows the City  
12 to convert the funds for its own purposes. The City has already transferred all of the funds  
13 contained therein to the General Retirement Trust Fund (RT 603:5-28; 692:27-693:21; 935:22-  
14 27). During trial, Assistant City Manager Alex Gurza conceded that, by transferring the SRBR  
15 funds to the General Retirement Trust Fund, the City’s actuaries could take this money into  
16 account when establishing the City’s future contribution rates, which would decrease as a  
17 result.<sup>4</sup> (RT 935:1-21.) Both Debra Figone and Alex Gurza concurred that transferring the  
18 SRBR funds to the General Retirement Trust Fund saved the City approximately \$13 million.  
19 (RT 693:5-21; 935:28-936:14.) Certainly, no trustee could justify such conduct. The City  
20 Council, as trustee for the SRBR funds, cannot lawfully do what no other trustee in the state of  
21 California could do, *i.e.*, abolish a trust and convert the funds of that trust for its own use.

22 Furthermore, the failure to contribute funds pursuant to a mandatory prescribed formula  
23 has been found to be an impairment of a vested right. (*TRB, supra*, 155 Cal.App.4th at 1022.  
24 and *Valdes v. Cory, supra*, 139 Cal.App.3d at 781.) Likewise, Section 3.28.340(A)(2)(a) of the  
25 SJMC similarly requires the City to contribute funds to the SRBR pursuant to a mandatory  
26 prescribed formula as set forth in paragraphs C and D. Here too, funds are being shifted from a  
27 specific fund that was to be used only to make supplemental benefits to retirees and their

28 <sup>4</sup> However, the freezing of distributions from the SRBR, which occurred for the three years prior to the passage  
of Measure B, would not (and did not) reduce the City’s contribution rates in any way (RT 934:22-28.)

1 beneficiaries. As Measure B abolishes the SRBR, it necessarily precludes funds from being  
2 contributed to the SRBR. Further, Measure B makes it a certainty that the funds which were to  
3 be used solely for retirees and their beneficiaries will not be available for that purpose, thereby  
4 impairing retirees' vested rights. As in *Valdes*, those funds are now improperly being used to  
5 enable the employer to reduce the amount of retirement contributions it is required to make.

6 Consequently, Measure B impairs the rights of Affected Retirees and Affected  
7 Beneficiaries to have the SRBR funded and maintained by the City and to have the City  
8 Council periodically exercise its discretion in good faith as to whether and to what extent those  
9 funds should be distributed to retirees and eligible beneficiaries on that particular occasion.<sup>5</sup>

10 **1. The City's financial condition has no impact on whether Affected**  
11 **Retirees and Affected Beneficiaries acquired vested rights with respect to the**  
12 **SRBR.**

13 During the trial, the City's attorneys repeatedly emphasized that the evidence it was  
14 offering relating to the City's financial condition was being presented solely for the limited  
15 purpose of rejecting claims presented in other consolidated cases not involving SJREA that  
16 accused the City of acting with improper motives. For example, at one point, Attorney Linda  
17 Ross responded to a relevancy objection regarding this proffered evidence by stating: "The  
18

19 <sup>5</sup> At trial, the City offered a series of "Tentative Agreements" whereby various recognized employee  
20 organizations tentatively agreed to eliminate the SRBR. (See for example, Exhibit 5712, GURZA000745)  
21 However, at least two witnesses, John Robb (RT 152:13-25) and Alex Gurza (RT 930:10-932:8), testified that  
22 recognized employee organizations bargain only on behalf of active employees, not retirees. Additionally, Gurza  
conceded that no labor organization ratified any such tentative agreement and, therefore, no binding contract ever  
materialized. (RT 889:6-14.)

The City also introduced a letter from Bob Leininger, President of SJREA, dated October 28, 2011 (Exhibit  
6070) where he offered to compromise the SRBR in order to avoid having Measure B put on the ballot.  
Apparently, this letter was offered to show that SJREA did not believe retirees had a vested right to the SRBR.  
The City's argument is undercut by the plain language of the letter, where Mr. Leininger stated on page 1, "The  
law is clear that all retirees have enforceable vested rights." Furthermore, the City acknowledged in its Pre-Trial  
Brief (at p. 18:6, fn. 14) that case law recognizes that unions cannot negotiate away the vested rights of their  
members.

Moreover, SJREA is not a recognized employee organization as defined in Government Code Section 3501(b)  
and therefore had no standing to bargain with the City with regard to individuals who are no longer employed by  
the City. Further, the letter expressly stated on page 2 that "We cannot speak for all Federated retirees...."

Finally, as an offer of compromise, it should not be given any consideration by the Court. (See Evidence Code  
Sections 1152(a) and 1154.) Therefore, the letter is irrelevant to the issues presented in this case.

1 reason the City is here with its economic evidence is because there are two claims in this case  
2 brought by AFSCME and brought by the POA. AFSCME has got the bill of attainder claim  
3 and the right to petition claim which depends on whether or not there was a legitimate public  
4 purpose here.” (RT 369:5-10.) Therefore, by its own admission, none of this evidence has any  
5 bearing on the SJREA case.”

6 The City’s retained expert, John Bartel, implied that the existence of the SRBR  
7 contributed to the City’s unfunded liability (RT 964:5-11.) Even if accurate, that evidence is  
8 absolutely irrelevant to SJREA’s action, which does not include any causes of action hinging  
9 on the City’s intent in passing Measure B or on the City’s financial condition.

10 As previously explained, SJMC Section 3.28.340(D)(2) makes the transfer of ten  
11 percent of any excess earnings mandatory (Exhibit 602, REA000294.) There are no  
12 contingencies or exceptions anywhere in SJMC Section 3.28.340 that allow for deviation based  
13 on the health of either the Federated Plan or the City.

14 Various City officials have previously acknowledged that the SRBR is not dependent on  
15 the health of the Federated Plan or the City. In a January 18, 2011 Memorandum from Alex  
16 Gurza, then Director of Employee Relations for the City, to the Mayor and City Council, he  
17 wrote:

18 The SRBR provides a “13<sup>th</sup>” check, which is a cash payment to retirees payable  
19 under certain circumstances in addition (sic) their regular monthly checks.  
20 When the retirement plans investment income exceeds their expected returns,  
21 10% of those “excess” earnings are credited to the SRBR. Under the current  
22 definition, “excess” earnings can be declared and transferred to the SRBR even  
23 if other actuarial assumptions have not been met and even if the plans are  
24 significantly underfunded, as they currently are. (Exhibit 642, SJ001334.)

25 Mayor Chuck Reed wrote the following in an October 13, 2010 Memorandum to the  
26 Rules and Open Government Committee:

27 The Supplemental Retiree Benefit Reserves allows for supplemental benefits or  
28 a 13<sup>th</sup> check to retirees as a bonus when the plan’s investment returns exceed  
expected returns. Apparently, this can take place even when the plan is vastly  
underfunded and despite major losses in prior years that have not been made up



1 by recent gains. I understand the Federated Plan may transfer funds and issue  
2 checks for SRBR payments even though the plan has a significant underfunded  
3 liability. Given the current state of both plans and the unfunded liabilities in  
4 excess of \$2 billion, I am recommending that the City Council direct staff to  
5 amend our ordinance to suspend this program.

6 Because that transfer is required and not discretionary, the Affected Retirees and  
7 Affected Beneficiaries acquired a vested right to the funding and maintenance of the SRBR  
8 irrespective of the Federated Plan's funding status.

9 **2. Neither the difficulty of funding the SRBR nor the City's historic**  
10 **failure to properly fund the SRBR affect the creation of vested rights.**

11 Mr. Bartel testified that, in his view, historically the SRBR was not properly funded  
12 (RT 966:27-967:12), which factor had the effect of driving up future contribution rates. (RT  
13 968:25-969:4.) He recognized that the SRBR was initially funded (RT 974:20-975:5),<sup>6</sup> though  
14 in his view, there was "little rigor" in the calculation of what the impact on contribution rates  
15 would be. (RT 966:27-967:12.) Thomas Lowman, the expert called by the Sapien plaintiffs,  
16 testified that, while benefits such as the SRBR are "difficult to value" (RT 293:6-14), there is  
17 no standard violated by the existence of the SRBR. (RT 297:15-298:2.) Though Bartel  
18 described the SRBR as a flawed system, even he had to apply the caveat "unless it is  
19 appropriately funded." (RT 963:18-24). Bartel conceded that his opinion does not relate to  
20 whether the benefit provided under the SRBR is flawed, just that the cost of the benefit was not  
21 properly considered by the actuaries who advise the retirement board. (RT 974:7-12.) Bartel  
22 also acknowledged that the City was not alone in offering an SRBR. (RT 973:22-974:6.)  
23 The difficulties in properly accounting for the SRBR from an actuarial perspective do not  
24 influence whether the rights concerning the SRBR are vested or not. The City did not offer any  
25 authority for that proposition. The point is academic, but even if the City were making a fiscal  
26 emergency argument with respect to impairing the rights to the SRBR, pursuant to the *Sonoma*

27 <sup>6</sup> The Federated City Employees Retirement System Annual Reports for 1985-1986 and 1986-1987 show the  
28 employees and the City each contributing a percentage of income to fund the SRBR, (over and above the 10% of  
excess earnings mandated by SJMC 3.28.340). (Exhibit 650, REA000717 and Exhibit 651, REA000781.)  
Federated City Employees' Retirement System Resolution No. 2002 (Exhibit 645, SJ002165-SJ002167) also  
illustrates that members were then contributing .06% of their income and the City contributed .17% of income in  
order to fund the SRBR. (Exhibit 645, SJ002166.)

1 (at 313) and *United Firefighters* (at 1112-13) Opinions, the City could not justify its fiscal  
2 emergency with evidence that its actuaries had poorly accounted for the SRBR.

3 **D. The Right To Have The City Council Provide Increased Benefits To**  
4 **Retirees And Beneficiaries Without The Approval Of The Voters.**

5 A city council's decision regarding a pension system that does not impair vested rights  
6 must be upheld unless expressly prohibited by the city charter. (*Grimm v. City of San Diego*  
7 (1979) 94 Cal.App.3d 33, 38.) Thus, the City Council, as the City's governing body, possessed  
8 the inherent authority to provide additional pension benefits to Affected Retirees and Affected  
9 Beneficiaries after retirement.

10 With respect to COLAs, medical and dental plan coverage, and the SRBR, persons who  
11 retired before these benefits were enacted have always received these benefits and all  
12 improvements related to these benefits. As a result, individuals (*i.e.*, Affected Retirees) who  
13 were employed while those benefits or improvements were voluntarily bestowed upon retirees  
14 and dependents of deceased retirees thereby acquired a vested right to be eligible for like  
15 voluntary benefits or improvements after they retired if the City Council exercised its **sole** and  
16 inherent discretion to provide them.

17 Section 1504-A of Measure B, entitled "Reservation of Voter Authority," added an  
18 obstacle that did not previously exist with respect to the distribution of additional benefits to  
19 Affected Retirees and their beneficiaries by requiring voter approval prior to any such  
20 distribution. In that regard, Section 1504-A of Measure B, entitled "Reservation of Voter  
21 Authority," states in pertinent part:

22 **Neither the City Council**, nor any arbitrator appointed pursuant to Charter  
23 **Section 1111, shall have the authority to agree to or provide any increase in**  
24 **pension and/or retiree health care benefits without voter approval**, except  
25 that the Council shall have the authority to adopt Tier 2 pension benefit plans  
within the limits set forth herein. (Emphasis added; Exhibit 700, POA007039.)

26 Requiring a vote of the people will make it much more difficult for Affected Retirees  
27 and Affected Beneficiaries to receive any future improvements or benefits from the City  
28 Council, should it desire to provide them. This change substantially impairs the vested rights of

1 the Affected Retirees and Affected Beneficiaries.

2 **V. ANY RIGHT THAT THE CITY CHARTER RESERVED TO THE CITY**  
3 **COUNCIL TO MODIFY THE FEDEDERATED PLAN DID NOT EMPOWER IT TO**  
4 **IMPAIR OR OTHERWISE REDUCE VESTED BENEFITS OF INDIVIDUALS WHO**  
5 **ALREADY HAD RETIRED OR THEIR BENEFICIARIES.**

6 The City's major response to this lawsuit is that City employees never obtained vested  
7 rights due to the existence of a so-called "reservation of rights" clause contained in Section  
8 1500 of the City Charter, which reads:

9 Except as hereinafter otherwise provided, the Council shall provide, by  
10 ordinance or ordinances, for the creation, establishment and maintenance of a  
11 retirement plan or plans for all officers and employees of the City. Such plan or  
12 plans need not be the same for all officers and employees. Subject to other  
13 provisions of this Article, the Council may at any time, or from time to time,  
14 amend or otherwise change any retirement plan or plans or adopt or establish a  
15 new or different plan or plans for all or any **officers or employees**. (Emphasis  
16 added; Exhibit 701, POA007114.)

17 Similar specific language referencing only officers or employees appears in City  
18 Charter Section 1503, which states:

19 Any and all retirement system or systems, existing upon adoption of this  
20 Charter, for the retirement of officers or employees of the City, adopted under  
21 any law or color of any law, including but not limited to those retirement  
22 systems established by Parts 1, 2 and 4 of Chapter 9 of Article II of the San Jose  
23 Municipal Code, are hereby confirmed, validated and declared legally effective  
24 and shall continue until otherwise provided by ordinance. The foregoing  
25 provisions of this Section shall operate to supply such authorization as may be  
26 necessary to validate any such retirement system or systems which could have  
27 been supplied in the Charter of the City of San Jose or by the people of the City  
28 at the time of adoption or amendment of any such retirement system or systems.  
However, subject to other provisions of this Article, the Council shall at all  
times have the power and right to repeal or amend any such retirement system or  
systems, and to adopt or establish a new or different plan or plans for all or any  
**officers or employees**, it being the intent that the foregoing sections of this  
Article shall prevail over the provisions of this Section. (Emphasis added;  
Exhibit 701, POA007115-007116.)

Because these provisions clearly limit any such empowerment to actions that affect only  
officers or employees, as opposed to retired members, the City's "reservation of rights"  
argument has no bearing on the retirement entitlements already possessed by individuals who

1 were retired at the time Measure B took effect or their eligible beneficiaries (*i.e.*, Affected  
2 Retirees and Affected Beneficiaries). Consequently, it does not provide authorization for the  
3 alterations contained in Measure B which are the subject of the SJREA lawsuit.

4 Under general settled canons of statutory construction, we ascertain the  
5 Legislature's intent in order to effectuate the law's purpose. [Citation.] We must  
6 look to the statute's words and give them their "usual and ordinary meaning."  
7 [Citation.] The statute's plain meaning controls the court's interpretation unless  
8 its words are ambiguous. If the plain language of a statute is unambiguous, no  
9 court need, or should, go beyond that pure expression of legislative intent.  
10 (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572, quoting *Kobzoff v. Los*  
11 *Angeles County Harbor/UCLA Medical Center* (1998) 19 Cal. 4th 851, 861; see  
12 also 58 Cal.Jur.3d, Statutes, §§ 83-88, 171.)

13 We seek to ascertain the Legislature's intent so that we may effectuate the law's  
14 purpose. Our goal is to interpret the language of the statute --not to insert what  
15 has been omitted or omit what has been inserted. We look first to the language  
16 of the statute itself, read as a whole, seeking to harmonize parts of a statutory  
17 scheme. If the words contained in the statute are reasonably free from  
18 ambiguity and uncertainty, we look no further than those words to ascertain the  
19 provision's meaning. [Citation.] (Emphasis added; *Bettencourt v. City and*  
20 *County of San Francisco* (2007) 146 Cal.App.4th 1090, 1100.)

21 In construing the statutory provisions a court is not authorized to insert  
22 qualifying provisions not included and may not rewrite the statute to conform to  
23 an assumed intention which does not appear from its language. The court is  
24 limited to the intention expressed. [Citations.] (*Mares v. Baughman* (2001) 92  
25 Cal.App.4th 672, 677, quoting *People v. One 1940 Ford V-8 Coupe* (1950) 36  
26 Cal.2d 471, 475; see also 58 Cal.Jur.3d, *supra*, §§ 90-91.)

27 "When we interpret a statute, we must avoid an interpretation that would render terms  
28 surplusage. Instead, we seek to give every word some significance, leaving no part useless or  
devoid of meaning." *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th  
1064, 1081. "While every word of a statute must be presumed to have been used for a purpose,  
**it is also the case that every word excluded from a statute must be presumed to have been**  
**excluded for a purpose.**" (Emphasis added; *Arden Carmichael, Inc. v. County of Sacramento*  
(2001) 93 Cal.App.4th 507, 516; see also 2A N. Singer, *Statutes and Statutory Construction*  
(6th ed. 2000), § 46:06.)

1 An application of these clear principles of statutory construction compels the conclusion  
2 that any reserved power to amend does not extend to benefits already provided to retirees or  
3 their eligible beneficiaries.

4 Moreover, most significantly, Measure B itself clearly articulates an intent not to reduce  
5 or impact any benefits already possessed by retirees at the time of its enactment. In particular,  
6 Section 1502-A, entitled "Intent," expressly states in its fourth and fifth paragraphs:

7 \* \* \*

8 \* \* \*

9 \* \* \*

10 This Act is not intended to deprive any current or **former employees** of benefits  
11 earned and accrued for prior service as of the time of the Act's effective date;  
12 rather, **the Act is intended to preserve earned benefits as of the effective date**  
13 **of the Act.**

14 This Act is **not intended to reduce the pension amounts received by any**  
15 **retiree** or to take away any cost-of-living increases paid to retirees as of the  
16 effective date of the Act. (Emphasis added; Exhibit 700, POA007037-007038.)

17 This unequivocal intent not to reduce, or even impact, the retirement benefits provided  
18 to individuals who were retired at the time Measure B took effect, or their eligible  
19 beneficiaries, is also reflected in the Argument submitted in favor of Measure B that was signed  
20 by the City's Mayor, among others. In particular, the fourth paragraph of the proponents'  
21 Argument states:

22 \* \* \*

23 \* \* \*

24 \* \* \*

25 Measure B would protect retirement benefits already earned by current  
26 employees but would reduce the cost to the city by making changes going  
27 forward. **It would not cut current payments to retirees.** . . . (Emphasis  
28 added; Exhibit 605, REA000442.)

It is well-established that in construing voter initiative language "we refer to other  
indicia of voter's intent, particularly the analyses in arguments contained in the official  
pamphlet." (*People v. Rizo* (2000) 22 Cal.4th 681, 685; *People v. Birkett* (1999) 21 Cal.4th  
226, 243.) During trial, the City's lead attorney, Arthur Hartinger, conceded: "So I think we all

1 agree that when you are looking at the interpretation of retirement provisions, you have to  
2 effectuate the intent of the voters at the time, and you have to – one instrument in doing that or  
3 one means of doing that is looking at the voter pamphlets.” (RT 52:8-13.)

4 From the foregoing, it is abundantly apparent that any rights the City might possibly  
5 have reserved under Sections 1500 *et seq.* of the City Charter to amend or change any  
6 retirement plan or establish a new or different plan only pertained to current officers or  
7 employees. Nothing in the City Charter or any other lawful enactment in any way stated that  
8 the retirement benefits awarded to retirees could thereafter be amended or changed or that any  
9 benefits earned by current employees could be amended or changed after they retired.

10 Furthermore, the language of section 1502-A of Measure B set forth above clearly  
11 reveals that the City and its electorate understand that retirees have previously earned benefits  
12 that must be preserved. Yet, if the City’s construction of the so-called “reservation of rights”  
13 clause were adopted, there would be no such thing as a preserved “previously earned benefit”  
14 because all benefits would be subject to change by the City.

15 **VI. EVEN IF CITY CHARTER SECTION 1500 *et seq.* WAS NOT CONSTRUED TO**  
16 **BE INAPPLICABLE TO RETIREES, IT CANNOT BE INTERPRETED TO**  
17 **EMPOWER THE IMPAIRMENTS SET FORTH IN MEASURE B.**

18 Taken to its logical conclusion, the City’s “reservation of rights” position means that a  
19 municipality can avoid the vested rights doctrine and eliminate all pension benefits earned by  
20 the Affected Retirees and Affected Beneficiaries. Until the drafting of Measure B, the City  
21 never believed it was entitled to do this, as evidenced by the fact that no Employee Handbooks  
22 distributed to Plan employees have stated that any rights discussed therein are subject to a so-  
23 called “reservation of rights” clause.<sup>7</sup> (See Exhibits 636, REA000600-000681, 653,  
24

25 <sup>7</sup> In addition, authorized City employees have made representations that employees’ have vested rights to  
26 pension benefits. For example, in Exhibit 214, George Rios, an attorney for the City cautioned the arbitrator about  
27 awarding pension benefits because “Unlike other employment benefits, such as salary (which may be linked to  
28 inflation or the consumer price index), retirement benefits in a defined benefit plan are not subject to the  
fluctuating economy. Once a retirement benefit has been installed in the retirement plan, the employee who meets  
the eligibility requirements has a vested right in the benefit upon retirement and it generally cannot be removed  
from the Federated Plan unless a benefit of equal or greater value is given.” (Exhibit 214, p. 2 of the Opening  
Brief.)

1 REA000978-000993, 655, SJ002296-SJ002374, REA000001-000084, REA000085-000169.)

2 Were the City allowed to do so, it would render its contract with its employees illusory.

3 Words of promise which by their terms make performance entirely optional with  
4 the “promisor” ... do not constitute a promise. Although such words are often  
5 referred to as forming an illusory promise, they do not fall within the present  
6 definition of promise. They may not even manifest any intention on the part of  
7 the promisor. Even if a present intention is manifested, the reservation of an  
8 option to change that intention means that there can be no promisee who is  
9 justified in an expectation of performance.” (Rest.2d Contracts, § 2, com. e, p.  
10 10; accord, *id.*, § 77, com. a, p. 195; 1 Corbin on Contracts (rev. ed. 1993) §  
11 1.17, p. 47.) “One of the most common types of promise that is too indefinite  
12 for legal enforcement is the promise where the promisor retains an unlimited  
13 right to decide later the nature or extent of his or her performance. This  
14 unlimited choice in effect destroys the promise and makes it illusory.” (1  
15 Williston on Contracts (4th ed. 2007) § 4:27, pp. 804–805, fns. omitted; accord,  
16 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, §§ 230–231, pp.  
17 264–266.) (*Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal. App. 4th  
18 1425, 1438-1439.)

19 In *Legislature v. Eu* (1991) 54 Cal.3d 492, the California Supreme Court struck down  
20 an initiative provision (“Prop 140”) which would have terminated the Legislators’ Retirement  
21 Law (“LRL”) as to certain legislators, thereby imposing significant limitations on legislators’  
22 previously earned pension rights. Specifically, a section was to be added to Article IV of the  
23 California Constitution to provide that the State will contribute the employer’s share to the  
24 Federal Social Security system on behalf of participating legislators “elected to or serving in  
25 the Legislature on or after November 1, 1990,” but “[n]o other pension or retirement benefit  
26 shall accrue as a result of service in the Legislature, such service not being intended as a  
27 career occupation.” (Emphasis added; *Id.* at 502-503.)

28 The individuals challenging Prop 140 claimed that it impaired vested rights to pension  
benefits, whereas its supporters relied on pre-existing language in Article IV, Section 4 of the  
California Constitution, which provided in pertinent part that “**The Legislature may, prior to  
their retirement, limit the retirement benefits payable to Members of the  
Legislature . . .**” (Emphasis added; *Id.* at 528-529.)

The Court held that this provision in the Constitution which seemingly allowed the  
Legislature to limit retirement benefits (Article VI, Section 4) did not prevent the creation of

1 vested rights. Specifically the Court stated (at 529):

2 That provision, seemingly empowering the Legislature to exercise some  
3 measure of control over the pension rights of its own members prior to their  
4 retirement, may create some uncertainty as to the full amount or extent of a  
5 legislator's pension rights during his term of office. **But the provision neither**  
6 **states nor implies that these rights are thus deemed inchoate and**  
7 **unprotected from impairment by the initiative process.** Significantly, we  
8 **have never suggested that the mere existence of article IV, section 4,**  
9 **precludes legislators from acquiring pension rights protected by the state or**  
10 **federal contract clauses.** (Emphasis added; *Cf. Allen v. Board of*  
11 *Administration, supra*, 34 Cal.3d at pp. 119-120.)

12 The Opinion (at 529-530) proceeded on the basis that, consistent with established  
13 appellate authority, the limiting language contained in Article IV, Section 4 of the California  
14 Constitution permitted only reasonable modifications to the pension system during the  
15 employment relationship provided the employees receive “comparable new advantages” in  
16 return for any substantial reduction in benefits. The Opinion concluded (at 530) that incumbent  
17 legislators had a vested right to earn additional pension benefits through continued service,  
18 despite the “potential but unexercised limitations contemplated by article IV, section 4, of the  
19 state Constitution.”

20 The so-called “reservation of rights” clause in the City Charter similarly neither states  
21 nor implies that any rights provided pursuant to City Charter Section 1500 are inchoate or  
22 unprotected from impairment. Therefore, it does not operate to preclude the creation of vested  
23 rights. Even in *Walsh v. Board of Administration* (1992) 4 Cal.App.4<sup>th</sup> 682, a case relied upon  
24 by the City, the Court in analyzing the LRL conceded: “We have no doubt that incumbent  
25 members of the Legislature at the time of the adoption of Proposition 140 had contractually  
26 vested pension rights under the LRL which would be protected under the contract clause. (*Id.*  
27 at 700, fn. 6.)

28 In *Southern California Gas Co. v. City of Santa Ana* (9th Cir. 2003) 336 F.3d 885, the  
Court analyzed a claim by the city of Santa Ana that any rights or obligations created by a  
contract with the Southern California Gas Co. were subject to a reservation of rights provision  
contained in that contract. Specifically, the city contended (at 893) that Section 8(a) of the



1 1938 Franchise allegedly subjects the gas company's rights to all ordinances "heretofore or  
2 hereafter adopted . . . in the exercise of [Santa Ana's] police powers . . . . Read in conjunction  
3 with sections 8(b) and 9, Santa Ana contends the gas company expressly acknowledged that its  
4 rights under the 1938 Franchise could be altered by future police power ordinances."

5 The Court rejected the city's contention, stating (at 893):

6 Santa Ana cannot avoid Contract Clause analysis merely by establishing that the  
7 trench cut ordinance is an otherwise legitimate exercise of police power. While  
8 the 1938 Franchise may acknowledge the need for further regulation pursuant to  
9 Santa Ana's police power, it does not enable Santa Ana to adopt ordinances that  
10 compromise its material terms. (Citations.) We cannot read the 1938 Franchise  
11 in a way that reserves to Santa Ana the power to unilaterally alter the terms of  
12 the agreement. Such an interpretation is "absurd;" section 8(a) "cannot be  
13 applied as broadly and retrospectively as its literal language may suggest."  
(Citations) (*See also Energy Reserves Group, Inc. v. Kan. Power & Light Co.*,  
459 U.S. 400, 412 n.14, 74 L. Ed. 2d 569, 103 S. Ct. 697 (1983), "When a State  
itself enters into a contract, it cannot simply walk away from its financial  
obligations.")

14 Like the contract in *Southern California Gas Co.*, the City cannot walk away  
15 from its contractual obligations to its former employees by relying on the so-called  
16 "reservation of rights" clause. If the Court was unwilling to enforce a "reservation of  
17 rights" clause in a contract where the parties had negotiated the language, it makes no  
18 sense that such a provision could be enforced as to the Affected Retirees and Affected  
19 Beneficiaries who did not negotiate the language in the City Charter.

20 **VII. SECTION 1515-A OF MEASURE B VIOLATES THE SEPARATION OF**  
21 **POWERS DOCTRINE.**

22 Section 1515-A(b) of Measure B, entitled "Severability," states in pertinent part:

23  
24 (b) If any ordinance adopted pursuant to the Act is held to be invalid,  
25 unconstitutional or otherwise unenforceable by a final judgment, the matter shall  
26 be referred to the City Council for determination as to whether to amend the  
ordinance consistent with the judgment, or whether to determine the section  
severable and ineffective." (Exhibit 700, POA007051-007052.)

27 No analysis of vested rights is required to determine that Section 1515-A constitutes a  
28 violation of the separation of powers among the legislative, executive, and judicial branches

1 under Article III, Section 3 of the California Constitution as the challenge to Section 1515-A is  
2 a facial challenge. A facial challenge, as opposed to an “as applied” challenge, asks the Court  
3 to consider only the text of the measure itself. *Tobe v. City of Santa Ana* (1995) 9 Cal.4th  
4 1069, 1084.

5 In *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245,  
6 267, the California Supreme Court discussed the factors a Court is to consider when  
7 determining whether the valid portion of a statute struck down in part may remain.

8 A severability clause, although not conclusive, “normally calls for sustaining the  
9 valid part of the enactment . . . . The final determination depends on whether  
10 ‘the remainder . . . is complete in itself and would have been adopted by the  
11 legislative body had the latter foreseen the partial invalidation of the statute’  
[citation] . . . .” (quoting from *Metromedia, Inc. v. City of San Diego* (1982) 32  
Cal.3d 180, 190.

12 As it is within the exclusive jurisdiction of the Courts to make the determination as to  
13 whether any parts of any ordinances adopted pursuant to Measure B are severable, it is a  
14 violation of the separation of powers doctrine to grant that power to the City Council.

15 **VIII. SECTION 1513-A OF MEASURE B VIOLATES ARTICLE XVI, SECTION 17**  
16 **OF THE CALIFORNIA CONSTITUTION.**

17 Section 1513-A of Measure B, entitled “Actuarial Soundness (for both pension and  
18 retiree healthcare plans),” states in pertinent part:

19 (c) In setting the actuarial assumptions for the plans, valuing the liability of  
20 the plans, and determining the contributions required to fund the plans, the  
21 objectives of the City’s retirement boards shall be to:

22 (i) achieve and maintain full funding of the plans using at least a median  
23 economic planning scenario. The likelihood of favorable plan  
24 experience should be greater than the likelihood of unfavorable plan  
experience; and

25 (ii) ensure fair and equitable treatment for current and future plan  
26 members and taxpayers with respect to the costs of the plans, and  
27 minimize any intergenerational transfer of costs. (Exhibit 700,  
POA007050.)

28 By enacting Section 1513-A, paragraph (c) of Measure B, the City has violated Article

1 XVI, Section 17(b) of the California Constitution, which states:

2 The members of the retirement board of a public pension or retirement system  
3 shall discharge their duties with respect to the system **solely in the interest of,**  
4 **and for the exclusive purposes of providing benefits to, participants and**  
5 **their beneficiaries,** minimizing employer contributions thereto, and defraying  
6 reasonable expenses of administering the system. A retirement board's **duty to**  
7 **its participants and their beneficiaries shall take precedence over any other**  
8 **duty.** (Emphasis added.)

9 As set forth in the San Jose Police Officers' Association's Pre-Trial Brief, the purpose  
10 of Section 17 is to prevent "meddling" with pension funds in times of perceived distress. (*State*  
11 *ex rel. Pension Obligation Bond Committee v. All Persons Interested in Matter of Validity of*  
12 *Cal. Pension Obligation Bonds* (2007) 152 Cal.App.4<sup>th</sup> 1386, 1392.)

13 Section 1513-A, paragraph (c) of Measure B compromises the Board's fiduciary duties  
14 to Affected Retirees and Affected Beneficiaries by compelling the Board to consider the  
15 interests of the City's residents and taxpayers on an equal basis with plan participants and their  
16 beneficiaries. However, the last sentence of Article XVI, Section 17(b) of the Constitution  
17 mandates that the Board's "duty to the participants and beneficiaries shall **take precedence**  
18 **over any [possible] other duty**" (emphasis added), including any obligation toward residents  
19 and taxpayers to minimize employer contributions.

20 At trial, the City argued that Section 1513-A, paragraph (c) could be reconciled with  
21 Article XVI, Section 17(b) because the City subsequently passed an ordinance, Exhibit 5301  
22 (Ordinance No. 29198), which "indicates and directs the Board of Retirement to discharge its  
23 duties in a manner consistent with the California Pension Protection Act." (RT 64:10-65:1.)

24 Initially, Ordinance No. 29198 only pertains to the Police and Fire Retirement System.  
25 However, even if it also pertained to the Federated System, the plain language of Section 1513-  
26 A, which became a part of the City's Charter, and thus takes precedence over the Municipal  
27 Code, mandates that the Board consider the interests of the City's residents and taxpayers on an  
28 equal basis with plan participants and their beneficiaries. That mandate cannot be reconciled  
with the Pension Protection Act. The City cannot nullify its Charter through its Municipal  
Code. Therefore, Section 1513-A, paragraph (c) is invalid and must be set aside.

1 **IX. JUDGMENT**

2 For all the reasons set forth above this Court hereby renders its Judgment:

3 (a) enjoining the City from in any way implementing or enforcing Sections 1504-A,  
4 1510-A, 1511-A, 1512-A(b), 1513-A(c) and 1515-A of Measure B;

5 (b) declaring that (1) Sections 1504-A, 1510-A, 1511-A(c) and 1512-A(b) of  
6 Measure B unconstitutionally impair vested contractual rights of Affected Retirees and  
7 Affected Beneficiaries in violation of the Contract Clause of the California Constitution, (2)  
8 Section 1515-A of Measure B violates Article III, Section 3 of the California Constitution; and,  
9 (3) Section 1513-A of Measure B contravenes Article XVI, Section 17(b) of the California  
10 Constitution; and

11 (c) ordering the issuance of a Peremptory Writ of Mandate commanding the City to  
12 return to the SRBR all monies previously transferred from it to another retirement fund or  
13 account.

14  
15  
16 Date: \_\_\_\_\_, 2013

\_\_\_\_\_  
PATRICIA M. LUCAS,  
Judge, Santa Clara Superior Court

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1428 Second Street, P.O. Box 2161, Santa Monica, California 90407-2161.

On September 10, 2013, I served the documents described as follows on the parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as set forth on the attached service list:

1. [PROPOSED] STATEMENT OF DECISION

☒ [By Electronic Mail] I caused the document(s) to be transmitted to the addressee(s) via electronic mail at the addresses listed on the attached Service List.

☐ [By Mail] I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, on the same day that correspondence is placed for collection and mailing, it would be deposited with the U.S. Postal Service with postage thereon fully prepaid at Santa Monica, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 10, 2013, at Santa Monica, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

MICHELE R. JOHNSON

  
SIGNATURE

**SERVICE LIST**

Gregg M. Adam  
**gadam@cbmlaw.com**

Jonathan Yank  
**jyank@cbmlaw.com**

Amber West  
**awest@cbmlaw.com**

Carroll Burdick & McDonough LLP  
44 Montgomery Street, Suite 400  
San Francisco CA 94104

John A. McBride  
**jmcbride@wmprlaw.com**

Christopher E. Platten  
**cplatten@wmprlaw.com**  
Wylie McBride Platten & Renner  
2125 Canoas Garden Avenue, Suite 120,  
San Jose, CA 95125-2124

Harvey L. Leiderman  
**hleiderman@reedsmith.com**

Jeffrey R. Rieger  
**jrieger@reedsmith.com**  
Reed Smith LLP  
101 Second Street, Suite 1800,  
San Francisco, CA 94105-3659

Teague P. Paterson  
**tpaterson@beesontayer.com**

Vishtap M. Soroushian  
**vsoroushian@beesontayer.com**

Beeson Taylor & Bodine APC  
Ross House, Suite 200  
483 Ninth Street  
Oakland, CA 94612

Arthur A. Hartinger  
**ahartinger@meyersnave.com**

Linda Ross  
**lross@meyersnave.com**  
Meyers Nave Riback Silver & Wilson  
555 12th Street, Suite 1500,  
Oakland, CA 94607

George Nathan Jaeger  
**njaeger@natejaeger.com**  
15118 San Jose Street  
Mission Hills, CA 91345